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No. 85-1263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NEW YORK STATE DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

SIERRA CLUB, THE CITY CLUB OF NEW YORK, NYC CLEAN AIR CAMPAIGN, INC., and HUDSON RIVER FISHERMEN'S ASSOCIATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

The Sierra Club, a respondent herein, is a California corporation, has no parent companies or subsidiaries (other than wholly owned subsidiaries), and has two affiliates, the Sierra Club Foundation and the Sierra Club Legal Defense Fund.

The City Club of New York is a New York not-for-profit corporation, has no parent companies or subsidiaries (other than wholly owned subsidiaries), and has one affiliate, the City Club Research Foundation, Inc.

The NYC Clean Air Campaign, Inc. is New York not-for-profit corporation and has no parent companies, subsidiaries (other than wholly owned subsidiaries), or affiliates.

The Hudson River Fishermen's Associa-

tion is a New York not-for-profit corporation and has no parent companies, subsidiaries (other than wholly owned subsidiaries), or affiliates.

TABLE OF CONTENTS

	Page
STATEMENT PURSUANT TO SUPREME COURT RULE 28.1.....	i
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE CASE.....	1
REASONS FOR DENYING THE WRIT.....	8
POINT I: THIS COURT NEED NOT DECIDE WHETHER THE ELEVENTH AMENDMENT BARS AN AWARD OF ATTORNEYS' FEES AGAINST A STATE, SINCE THE COURT HAS ALREADY RULED ON THAT ISSUE.....	8
POINT II: THERE IS NO PRESENT CONFLICT AMONG THE COURTS OF APPEALS AS TO WHETHER THE ELEVENTH AMENDMENT BARS AN AWARD OF ATTORNEYS' FEES AGAINST A STATE.....	13
POINT III: THE QUESTION PRESENTED IN THE PETITION ARISES ONLY RARELY AND IS NOT IMPORTANT ENOUGH TO JUSTIFY GRANTING THE WRIT.....	17
CONCLUSION.....	22

TABLE OF AUTHORITIES

Cases: Page

Action for Rational Transit v. West Side Highway Project, 536 F. Supp. 1225 (S.D.N.Y. 1982), aff'd in part, rev'd in part sub nom. Sierra Club v. United States Army Corps of Engineers, 701 F.2d 1011 (2d Cir. 1983)..... 3

Atascadero State Hospital v. Scanlon, ___ U.S. ___, 105 S. Ct. 3142 (1985)..... 16

Bailey v. Weinberger, 419 U.S. 953 (1974)..... 19

Browning Debenture Holders' Committee v. DASA Corp., 560 F.2d 1078 (2d Cir. 1977)..... 21

California Department of Industrial Relations v. Homemakers, Inc. of Los Angeles, 423 U.S. 1063 (1976) 18

Edelman v. Jordan, 415 U.S. 651 (1974)..... 9

Gagne v. Maher, 594 F.2d 336 (2d Cir. 1979), aff'd, 448 U.S. 122 (1980)..... 11, 14, 21

Greco v. Orange Memorial Hospital Corp., 423 U.S. 1000 (1975)..... 19

Page

Green v. Mansour, ___ U.S. ___, 106 S. Ct. 423 (1985)..... 16

Hallmark Clinic v. North Carolina Department of Human Resources, 519 F.2d 1315 (4th Cir. 1975).... 16

Huecker v. Milburn, 538 F.2d 1241 6th Cir. 1976)..... 15

Hutto v. Finney, 437 U.S. 678 (1978)..... passim

Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974), cert. denied, 421 U.S. 991 (1975)..... 15

Kentucky v. Graham, 473 U.S. ___, 105 S. Ct. 3099 (1985)..... 12, 16

Lay v. Williams, 434 U.S. 910 (1977)..... 18

Maher v. Gagne, 448 U.S. 122 (1980)..... 12

Massachusetts Trustees of Eastern Gas and Fuel Associates v. United States, 377 U.S. 235 (1964)..... 18

Nemeroff v. Abelson, 620 F.2d 339 (2d Cir. 1980)..... 20

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984).... 16

Page

Pulliam v. Allen, 466 U.S. 522, 104 S. Ct. 1970 (1984)..... 16

Sierra Club v. United States Army Corps of Engineers, 776 F.2d 383 (2d Cir. 1985).....2, 6, 14, 21

Sierra Club v. United States Army Corps of Engineers, 701 F.2d 1011 (2d Cir. 1983)..... 4

Sierra Club v. United States Army Corps of Engineers, 614 F. Supp. 1475 (S.D.N.Y.), aff'd in part, rev'd in part, 772 F.2d 1043 (2d Cir. 1985)..... 3

Sierra Club v. United States Army Corps of Engineers, 590 F. Supp. 1509 (S.D.N.Y. 1984), aff'd in part, rev'd in part, 776 F.2d 383 (2d Cir. 1985).....5, 21

Sierra Club v. United States Army Corps of Engineers, 541 F. Supp. 1367 (S.D.N.Y. 1982), aff'd in part, rev'd in part, 701 F.2d 1011 (2d Cir. 1983).....3, 4

Constitution:

U.S. Const. Amend. XI..... passim

Page

Statutes:

Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988..... 9

Clean Water Act § 404, 33 U.S.C. § 1344..... 3

Equal Access to Justice Act, 28 U.S.C. § 2412(d)..... 4

National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq..... 2

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- against -

SIERRA CLUB, THE CITY CLUB OF NEW YORK, NYC CLEAN AIR CAMPAIGN, INC., and HUDSON RIVER FISHERMEN'S ASSOCIATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

This brief is submitted on behalf of the respondents in opposition to the petition of the New York State Department of Transportation ("NYSDOT" or the

"petitioner") for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. The petitioner seeks review of the portion of the Second Circuit's opinion and judgment in Sierra Club v. United States Army Corps of Engineers, 776 F.2d 383 (2d Cir. 1985), that upheld an award of attorneys' fees against the petitioner.

The litigation in which the attorneys' fees award was made concerned the proposal to build the West Side Highway Project ("Westway") along the Hudson River shoreline of Manhattan. In the course of the litigation against NYSDOT, the United States Army Corps of Engineers (the "Corps"), and the Federal Highway Administration ("FHWA"), the defendants were found to have violated the National Environmental Policy Act,

42 U.S.C. §§4321 et seq., and section 404 of the Clean Water Act, 33 U.S.C. §1344. As a result, Westway was enjoined in 1982 and again in 1985. See Action for Rational Transit v. West Side Highway Project, 536 F. Supp. 1225 (S.D.N.Y. 1982), aff'd in part, rev'd in part sub nom. Sierra Club v. United States Army Corps of Engineers, 701 F.2d 1011 (2d Cir. 1983); Sierra Club v. United States Army Corps of Engineers, 541 F. Supp. 1367 (S.D.N.Y. 1982), aff'd in part, rev'd in part, 701 F.2d 1011 (2d Cir. 1983); Sierra Club v. United States Army Corps of Engineers, 614 F. Supp. 1475 (S.D.N.Y.), aff'd in part, rev'd in part, 772 F.2d 1043 (2d Cir. 1985).

Westway was to be built in a landfill of approximately 200 acres in the Hudson River. In two trials in 1982,

the district court found that the defendants, principally NYSDOT, had suppressed important information revealing abundant fish, notably striped bass, in the area to be filled and had falsely maintained that the area was a "biological wasteland." The district court found that in so doing the defendants had acted in bad faith, see, e.g., 541 F. Supp. at 1379, 1381, and the Second Circuit explicitly upheld those findings as to NYSDOT and the FHWA. See 701 F.2d at 1047.

Four of the plaintiffs in the underlying litigation, who are the respondents herein, applied for attorneys' fees for the portion of the litigation involving the 1982 trials, under the common law and, against the federal defendants, under the Equal Access to Justice Act, 28 U.S.C. §2412(d)

("EAJA"). In 1984, the district court awarded part of the requested fees under the "bad faith" exception to the common law rule on attorneys' fees. Sierra Club v. United States Army Corps of Engineers, 590 F. Supp. 1509 (S.D.N.Y. 1984). In awarding fees for bad faith conduct before and during trial, the district court described NYSDOT's defenses at trial as "lacking in any colorable basis" and called the lack of credibility of the defense witnesses "abnormal and extraordinary." Id. at 1525. The Second Circuit upheld the bad faith award against NYSDOT, for the trial work but not the appellate work, but reversed the bad faith award against the Corps, holding that the plaintiffs were entitled to fees against the Corps under EAJA instead of

the common law.[1] 776 F.2d at 391-92, 394.

NYSDOT argued in both the district court and the court of appeals that the Eleventh Amendment to the United States Constitution shields it from any attorneys' fees award against it in federal court. Both the district court and a unanimous panel of the Second Circuit rejected that argument. In doing so, they relied on the decisions of this Court as well as Second Circuit precedent.

The petitioner now argues that the Second Circuit ruled incorrectly on the issue of whether the Eleventh Amendment bars an award of bad faith attorneys' fees against a state and that there is

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[1] The FHWA did not appeal the award of bad faith attorneys' fees against it.

an intolerable conflict among the courts of appeals on that issue. The petitioner is wrong. For the reasons stated below, the respondents respectfully urge this Court to deny the petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

POINT I

THIS COURT NEED NOT DECIDE WHETHER THE ELEVENTH AMENDMENT BARS AN AWARD OF ATTORNEYS' FEES AGAINST A STATE, SINCE THE COURT HAS ALREADY RULED ON THAT ISSUE

The question the petitioner asks this Court to resolve is one that does not need to be resolved, since the Court has already addressed it and found the Eleventh Amendment not to be a bar to the award of attorneys' fees against a state. The Court's most extensive consideration of the question of attorneys' fees against a state was in Hutto v. Finney, 437 U.S. 678 (1978).

In Hutto, this Court explicitly upheld the award of attorneys' fees against state officials both under the common law "bad faith" theory and under the statutory attorneys' fees provision

in 42 U.S.C. §1988. As to the award under the common law, the Court stated that "the substantive protections of the Eleventh Amendment do not prevent an award of attorneys' fees against the [State Correction] Department's officers in their official capacities." Id. at 692. The Court explained the purpose of the award as follows: "The award vindicates judicial authority without resort to the more drastic sanctions available for contempt of court and makes the prevailing party whole for expenses caused by his opponent's obstinacy." Id. at 689 n.14. Furthermore, the Court analyzed the application of its decision in Edelman v. Jordan, 415 U.S. 651 (1974), to the attorneys' fees situation and then explicitly placed the bad faith attorneys' fees award it approved within the

Edelman category of costs that are "ancillary" to prospective relief. Id. at 690.

The petitioner attempts to distinguish the present case from Hutto on the ground that the award in Hutto was justified by the state officials' violation of court orders. The bad faith conduct in the present case, however, consisted of the petitioner's deliberate suppression -- both before and during trial -- of information it was obligated by law to reveal. Surely, litigants should not have to be ordered to testify truthfully, and it should not be constitutionally significant that the petitioner was not under such explicit orders. As the district court found in the instant case, "the Commissioner [of NYSDOT] was bound to observe the rules and standards of conduct

applicable in a federal court. It necessarily follows that the Commissioner should be subject to sanctions, including the assessment of attorneys' fees and disbursements, for failure to observe these rules and standards." 590 F. Supp. at 1526-27.

After its decision in Hutto, this Court affirmed the Second Circuit's ruling in Gagne v. Maher, which had upheld an award of attorneys' fees against the Connecticut Commissioner of Social Services, despite the commissioner's Eleventh Amendment challenge. 594 F.2d 336 (2d Cir. 1979), aff'd, 448 U.S. 122 (1980). Although this Court's opinion in Gagne dealt with statutory attorneys' fees rather than common law fees, the Court repeated its discussion in Hutto v. Finney, supra, of attorneys' fees as part of litigation costs,

which a court has "inherent authority" to award as a means of controlling the litigants before it. Maher v. Gagne, supra, 448 U.S. at 132 n.14. Accord, Kentucky v. Graham, 473 U.S. ____, 105 S. Ct. 3099, 3107 n.18 (1985) ("Monetary relief that is 'ancillary' to injunctive relief . . . is not barred by the Eleventh Amendment.").

The rationale for the award of bad faith attorneys' fees in the instant case is the same as that for the award of bad faith attorneys' fees in Hutto: the vindication of judicial authority. Accordingly, Hutto is directly applicable and controlling in these circumstances.

POINT II

THERE IS NO PRESENT CONFLICT AMONG THE COURTS OF APPEALS AS TO WHETHER THE ELEVENTH AMENDMENT BARS AN AWARD OF ATTORNEYS' FEES AGAINST A STATE

The petitioner urges this Court to grant certiorari in this case as the only way to resolve an alleged conflict among the circuits on the issue of whether the Eleventh Amendment bars attorneys' fees awards against a state. It appears to the respondents, however, that there is no longer such a conflict.

The alleged conflict appears to have been resolved by this Court's decision in Hutto v. Finney, supra, which is discussed in Point I above. In the present case, the Second Circuit correctly followed this Court's decisions, including Hutto, as well as Second Circuit precedents, in deciding that the Eleventh Amendment presents no bar to

the award of attorneys' fees against NYSDOT in these circumstances.

The Second Circuit did note in its opinion the existence of cases in other circuits holding a contrary view. 776 F.2d at 388-89. Those cases, however, all predate Hutto and this Court's affirmance of Gagne v. Maher, supra, and are no longer tenable. Thus, they do not present a current conflict among the circuits requiring this Court's resolution.

The cases creating the alleged conflict with the Second Circuit's position are cited on pages 7-8 of the petition. Not one of the cases was decided after 1976. Accordingly, none took into account this Court's ruling in Hutto and its affirmance of Gagne v. Maher, supra.

Moreover, the cases relied on by the

petitioner rest on the assumption that attorneys' fees are damages. See, e.g., Huecker v. Milburn, 538 F.2d 1241, 1244 (6th Cir. 1976); Jordan v. Gilligan, 500 F.2d 701, 709 (6th Cir. 1974), cert. denied, 421 U.S. 991 (1975).[2] That assumption, which the petitioner has adopted, is contrary to the view of this Court. In Hutto, the Court made it clear that attorneys' fees should be classed with costs rather than with damages. See 437 U.S. at 690 & n.14, 695-98. In two very recent cases concerning attorneys' fees, the Court has reiterated the view that attorneys' fees are costs, not

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[2] Moreover, Jordan v. Gilligan is not directly relevant here, since it did not concern an award of bad faith attorneys' fees.

damages.[3] See Kentucky v. Graham, supra, 105 S. Ct. at 3104 & n.7; Pulliam v. Allen, 466 U.S. 522, 104 S. Ct. 1970, 1973 & n.4, 1982 (1984). Accordingly, the decade-old cases from the Sixth Circuit,[4] which rest on discredited premises, should not be used to create a conflict requiring resolution.

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[3] It is significant that in its petition for certiorari on a question involving attorneys' fees, NYSDOT declines even to mention this Court's recent rulings in attorneys' fees cases and instead relies on decisions that have nothing to do with fees, such as Green v. Mansour, __ U.S. __, 106 S. Ct. 423 (1985), Atascadero State Hospital v. Scalon, __ U.S. __, 105 S. Ct. 3142 (1985), and Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984).

[4] The main Fourth Circuit case cited by the petitioner, Hallmark Clinic v. North Carolina Department of Human Resources, 519 F.2d 1315 (4th Cir. 1975) is inapposite because the Court

(Footnote Continued)

POINT III

THE QUESTION PRESENTED IN THE PETITION ARISES ONLY RARELY AND IS NOT IMPORTANT ENOUGH TO JUSTIFY GRANTING THE WRIT

Even if there were a current conflict among the circuits, which there is not, as explained in Point II, this Court should not grant the writ. The question presented arises only rarely and thus is not important enough to justify granting the writ.

Review on a writ of certiorari is reserved for cases in which "there are special and important reasons therefor." Sup. Ct. R. 17. Among the considerations in determining whether an issue is sufficiently important to justify granting the writ are whether a

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(Footnote Continued)
there denied fees not on Eleventh Amendment grounds, but rather because it found no bad faith. Id. at 1317.

significant number of people are affected by the issue, see, e.g., Lay v. Williams, 434 U.S. 910 (1977) (White, J., dissenting from denial of petitions for writ of certiorari), and whether many suits arise involving the issue, see, e.g., Massachusetts Trustees of Eastern Gas and Fuel Associates v. United States, 377 U.S. 235, 237 (1964).

Mere existence of a conflict among the circuits is not sufficient to justify granting the writ. Indeed, the Court has refused to grant certiorari in many cases involving issues on which there was a conflict. See, e.g., California Department of Industrial Relations v. Homemakers, Inc. of Los Angeles, 423 U.S. 1063, 1063 (1976) (White, J., dissenting) (petition for a writ of certiorari denied in case

concerning whether a state statute requiring employers to pay premium overtime wages to female, but not male, employees conflicted with and was preempted by Title VII of the Civil Rights Act of 1964, a question on which there was a "square conflict" among the circuits); Greco v. Orange Memorial Hospital Corp., 423 U.S. 1000, 1000-01 (1975) (White, J., dissenting) (petition denied in case concerning whether a private hospital with substantial public funding and control may refuse to perform elective abortions, an issue on which there was a "clear" conflict among the circuits); Bailey v. Weinberger, 419 U.S. 953, 953 (1974) (White, J., dissenting) (petition denied in case concerning claims for Social Security benefits and presenting

an issue on which there was a square conflict among the circuits).

The instant case is not one on which the scarce resource of this Court's time should be spent, since it involves an unusual situation that is unlikely to arise frequently in the future. Bad faith attorneys' fees are rarely awarded against anyone, because the requirements for such awards are so stringent.[5] See, e.g., Nemeroff v.

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[5] Statutory attorneys' fees, for which the requirements are less stringent, are more common. Ironically, in this case, if this Court were to grant the petition and reverse the Second Circuit's decision, the burden of the petitioner's wrongdoing would fall on the federal government as well as on the respondents. This would occur because the Second Circuit ruled that the Corps was liable for fees under EAJA, although not under the common law. Thus, the Corps will be obliged to pay fees to the respondents and, if the bad faith award against

(Footnote Continued)

Abelson, 620 F.2d 339, 348 (2d Cir. 1980); Browning Debenture Holders' Committee v. DASA Corp., 560 F.2d 1078, 1088 (2d Cir. 1977). Bad faith attorneys' fees against a state are rarer still and are awarded only in the most extraordinary circumstances. Most of the cases cited by the petitioner do not involve awards of bad faith attorneys' fees against a state. Among those that do, only two, Hutto v. Finney, supra, and Gagne v. Maher, supra, were decided since 1976. Where so few persons and so few cases are affected, this Court should decline to

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(Footnote Continued)
NYSDOT were reversed, would not be entitled to contribution from NYSDOT, which both the district court and the Second Circuit found to be the principal wrongdoer. See 776 F.2d at 391-92; 590 F. Supp. at 1523-25.

grant NYSDOT's petition for a writ of certiorari.

CONCLUSION

For the reasons stated above, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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